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IN THE

Supreme Court of the United States

October Term, 1954

No. .....

WESTERN AIR LINES, INC.,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

In compliance with Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States, appellant Western Air Lines, Inc., respectfully presents this statement of the basis upon which it contends that the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California entered in this cause.

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I.

Opinion Below.

The opinion of the Supreme Court of the State of California, review of which is here sought, is reported at 42 Advance California Reports 634. A copy of the opinion is attached to this statement as Appendix A.

II.

Statement of Grounds On Which Jurisdiction of This Court Is Invoked.

A. Nature of the Proceeding.

This case involves the imposition of statutory penalties on a Federally certificated interstate air carrier for failing to secure the approval of a State agency before increasing its fares, pursuant to the Civil Aeronautics Act of 1938, as amended (49 U. S. Code, §401 *et seq.*), over an intra-state segment of an interstate air route. The action was commenced under Section 2104 of the Public Utilities Code of the State of California to collect the penalties prescribed in Sections 2107 and 2108 of that Code.

B. Jurisdictional Dates.

The opinion and judgment of the Supreme Court of the State of California, Appendix A, was dated, filed and entered on April 2, 1954. On April 28, 1954, a petition for rehearing was denied,[1] and on July 1, 1954, appellant filed a notice of appeal in the Supreme Court of the State of California [Tr., p. 1] pursuant to Rule 10 of this Court's Revised Rules.

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[1]The petition for rehearing was presented solely on State grounds and therefore is not pertinent on this appeal.

C. Statutory Basis for Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review by appeal the decision of the Supreme Court of the State of California in this proceeding is conferred by Title 28, U. S. Code, Sections 1257(2) and 2101(c).

D. Cases Believed to Sustain Jurisdiction.

1. THE DECISION SOUGHT TO BE REVIEWED IS A FINAL JUDGMENT FOR PURPOSES OF APPELLATE JURISDICTION OF THIS COURT.

This case came before the Supreme Court of California after dismissal of the action on general demurrer [Tr., p. 9]. The California Supreme Court reversed, holding that the demurrer was improperly sustained (App. A, p. 31).

Appellant now has no defense to the imposition of the asserted penalties, except on the Federal grounds already decided by California Supreme Court in the decision sought to be reviewed and on equitable grounds appealing to the conscience of the trial court to impose penalties less than the maximum penalties prescribed in the statute. Section 2107 of the Public Utilities Code of California prescribes a penalty of not less than $500.00 nor more than $2,000.00 for each offense. Section 2108 provides that each day's continuance of violation shall constitute a separate and distinct offense.

In *Radio Station WOW v. Johnson*, 326 U. S. 120 (1945), the Supreme Court of the State of Nebraska canceled a lease, set aside a license issued by the Federal Communications Commission, and ordered an accounting of the profits realized by the lessee. This Court ruled that the judgment of the Nebraska Court was final in

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its relation to Federal appellate jurisdiction, despite the direction for an accounting. Mr. Justice Frankfurter, speaking for this Court, made the following statement:

> "The presumption in allowing such a review is that the Federal questions which could come here have been adjudicated by the State court and that . . . which remains . . . could not remotely give rise to a Federal question." (P. 127.)

In *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953), the Railroad Company sued to enjoin the petitioner, a Georgia resident, from bringing an action in Alabama under the Federal Employees' Liability Act. The trial court sustained a general demurrer to the petition. The Georgia Supreme Court reversed. This Court ruled that the judgment of the Georgia Supreme Court was final and that Federal jurisdiction to review the judgment existed. Through Mr. Chief Justice Vinson, this Court declared:

> ". . . Ordinarily . . . the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment.
>
> "Yet we are not bound to determine the presence or absense of finality from a mere examination of the 'face of the judgment'. We have not interpreted §1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of §1257." (P. 382.)

2. THE INVALIDITY OF A CALIFORNIA STATUTE, ON THE GROUND THAT IT IS REPUGNANT TO FEDERAL LAW, HAS BEEN DRAWN INTO QUESTION AND THE HIGHEST COURT OF CALIFORNIA HAS HELD IT VALID.

In *Fiske v. Kansas*, 274 U. S. 380 (1927), this Court, speaking through Mr. Justice Sanford, stated:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under §237 of the Judicial Code." (P. 385.)

E. Statutes Involved.

The statutes of the State of California, the validity of which is questioned as applied to appellant, are Sections 2107 and 2108 of the California Public Utilities Code.

Section 2107 (Vol. 1, 1951 Stats. Cal., p. 2098) reads:

> "Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

Section 2108 (Vol. 1, 1951 Stats. Cal., p. 2108) reads:

> "Every violation of the provisions of this part or any part of any order, decision, decree, rule, direc-

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tion, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Article XII, Section 20, of the California Constitution, which also is involved, reads:

"No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the . . . commission provided for in this constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property."

III.

Questions Presented.

The basic questions to be presented on this appeal are:

1. Is state regulation of intrastate operations of *interstate* air carriers a burden on interstate commerce and violative of Article I, Section 8, Subsection 3, of the Constitution of the United States?

2. Has the Congress of the United States fully occupied the field of economic regulation of *interstate* air carriers, including their intrastate as well as interstate operations, so that any economic regulation by the States is precluded?

IV.

Statement of the Case.

Appellant is an air carrier and engages in the transportation by air of persons, property and mail in interstate commerce pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board of the United States under the Civil Aeronautics Act. One of the certificates, for what is known as air route 63, permits appellant to provide air transportation between Los Angeles, California, and Seattle, Washington, via the intermediate points San Francisco and Oakland, California, and Portland, Oregon.

On March 1, 1951, appellant, acting under applicable and mandatory provisions of the Civil Aeronautics Act and applicable rules and regulations of the Civil Aeronautics Board, received permission to and in fact did increase its air coach fares between Los Angeles and San Francisco, California.

On March 6, 1951, the Public Utilities Commission of the State of California ordered that an investigation be instituted into the fares charged by appellant within the State of California.

On April 24, 1951, the Public Utilities Commission of the State of California issued an order, effective May 9, 1951, purportedly authorizing appellant to increase its air coach fares between Los Angeles and San Francisco, California, to the level of such fares as established in the tariff filed by appellant with and placed into effect at the insistence and with the permission of the Civil Aeronautics

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Board on March 1, 1951, but requiring appellant to refund the excessive fares collected in the interim.

In accordance with applicable procedure in California, appellant petitioned the California Supreme Court to review the order of the California Public Utilities Commission. After denial of the petition without opinion, appellant sought relief in this Court. The appeal was dismissed for want of a substantial Federal question, with Mr. Justice Black and Mr. Justice Burton being of the opinion that probable jurisdiction should be noted (*Western Air Lines v. Public Utilities Commission of the State of California,* 342 U. S. 908).

Thereafter, pursuant to Section 2104 of the California Public Utilities Code, this action was instituted in the name of the People of the State of California to recover statutory penalties aggregating $138,000.00.

The base of the complaint is that appellant should be penalized thusly as the result of charging air fares between Los Angeles and San Francisco, California, during the period from March 1, 1951, to and including May 8, 1951, which had not been approved by the Public Utilities Commission of the State of California pursuant to Article XII, Section 20, of the California Constitution, but which had been authorized by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act.

Appellant interposed a general demurrer which was sustained without leave to amend. Appellee appealed. The California District Court of Appeal, Second Appellate District, affirmed the judgment of the trial court (258 P.

2d 581),[2] following which the California Supreme Court on appellee's petition granted a hearing. The decision of April 2, 1954, review of which is here sought, resulted.

Appellant, as defendant, raised the Federal questions with which this statement is concerned in the points and authorities in support of its general demurrer filed in the trial court and in the brief and supplemental brief which, as respondent, it filed in the California District Court of Appeal, Second Appellate District, and in the California Supreme Court. [Tr., pp. 11 and 12.] The Federal questions were argued orally before each of the State courts. In each instance, it was urged by appeallant (i) that the commerce clause, because of the need for national uniformity in the regulation of air transportation, precludes any State regulation of air carriers, and (ii) that the Congress of the United States has fully occupied the field of regulating air carriers certificated under the Civil Aeronautics Act, which bars trespassing by the States.

The trial court and the California District Court of Appeal, Second Appellate District, did not pass upon the Federal questions, having ruled in favor of appellant on State grounds. The California Supreme Court in reversing the judgment of the trial court expressly answered each of the Federal questions raised by appellant by holding that federally-certificated interstate air carriers were subject to the California statutes in question.

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[2]The California District Court of Appeal, Second Appellate District, ruled that as a matter of State law the California Public Utilities Commission had no jurisdiction over air carriers. Accordingly, that Court did not reach the Federal questions interposed by appellant. For this reason its opinion, which under California law is set aside when the California Supreme Court grants a hearing after decision in the District Court of Appeal, is not appended.

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V.

The Federal Questions Involved Are Substantial.

A. Air Transporation is of National Importance and Character and National Uniformity of Regulation is Required.

According to official records of the Civil Aeronautics Board, 96% of the passenger miles flown by air carriers during 1952 were in interstate commerce, and during 1953 the average length of passenger trips by air on all United States air carriers was 586 miles.[3] These figures confirm the national importance and the national character of air transportation. And when weighed with the fact that of the 92 most populous cities in the United States 79 are less than 100 miles from the nearest state line, with an average distance of 34.6 miles, the complete domination of the interstate phase of air transportation over the trifling intrastate phase is spotlighted.

Additionally, as compared with railroads, the geographical coverage of air carriers is more extensive. The largest domestic airline serves 24 states, whereas the largest railroad system serves only 14.

The burden of conflicting and increasingly hostile State regulation, therefore, becomes particularly severe in the case of air carriers because of the overwhelmingly interstate character of air transportation. The field of air transportation is still new and the States only now are awakening to the inviting potentials of local economic regulation.

The nation's needs and the nature of air transportation demand uniform and exclusive regulation of air trans-

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[3]The comparable statistics for railroads show that only 55% of the passengers move in interstate commerce with an average trip length of only 135 miles, excluding commuting service.

portation by the Federal Government, unfettered from inconsistent and useless State regulation. In the language of Mr. Justice Jackson, air transportation is not "a mere outgrowth or overgrowth of surface-bound transport" but "soared into a different realm than any that had gone before." (*Chicago and Southern Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103 (1948).)

The importance of air transportation to the nation, and the tendency of air transportation quickly to escape the bounds of "local regulative competence" (Mr. Justice Jackson, *ibid.*) make this a ripe case for the Court to confirm that the United States Constitution and the Congress have placed the field of air transportation beyond the disruptive and destructive grasp of State regulation and exclusively within the jurisdiction of the Federal Government.

The principle urged by appellant was stated by Mr. Chief Justice Stone in *Southern Pacific Company v. Arizona*, 325 U. S. 761 (1945), in this fashion:

> "But ever since Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, the states have not been deemed to have authority . . . to regulate those phases of the national commerce which, *because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.*"[4] (P. 767.)

In *Morgan v. Commonwealth of Virginia*, 328 U. S. 373 (1946), Mr. Justice Reed declared:

> "Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." (P. 377.)

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[4]Emphasis in quoted material added throughout unless otherwise noted.

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The analogies in the cases decided by this Court are several. There is need for national uniformity in the regulation of air transportation, regardless of whether or not the Congress has spoken, just as there was need for national uniformity in the regulation of the navigable waters of the United States. As stated by Mr. Justice Jackson, concurring in *Northwest Airlines, Inc. v. State of Minnesota*, 322 U. S. 292 (1944):

> "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of Federal control. Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, to United Stated v. Appalachian Electric Power Co., 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291. *Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water.* Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." (P. 303.)

The national character of radio transmission was recognized by Mr. Chief Justice Hughes in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933), when he made this statement:

> "No state lines divide the radio waves, and *national regulation is not only appropriate but essential to the efficient use of radio facilities.*" (P. 279.)

In *Braniff Airways v. Nebraska State Board of Equalization* (No. 476, June 1, 1954), Mr. Justice Frankfurter, dissenting, made this pertinent declaration:

> "It is the diverse and fluctuating exercise of power by the various states, even where based on concededly

relevant factors, which imposes an undue burden on interstate commerce."

Clearly, the argument that the commerce clause by itself will not brook interference by the states with the operations of air carriers is substantial and deserves the attention of this Court. In the language of Mr. Justice Murphy, speaking for this Court in *American Power and Light Company v. Securities and Exchange Commission,* 329 U. S. 90 (1946):

". . . the federal commerce power is as broad as the economic needs of the nation." (P. 104.)

B. The Civil Aeronautics Act Provides An Exhaustive and Exclusive Regulatory System Governing the Economic Affairs of Interstate Air Carriers.

The Civil Aeronautics Act of 1938 covers every possible sphere in the regulation of air carriers coming within the Act. No significant area, whether interstate or intrastate, in which economic regulation ought to be exercised has been omitted. Federal regulation extends to certification of routes and extensions of routes (§401), filing and change of tariffs between all points (§403) fixing of commercial rates and fares and mail pay (§§404 and 406), approval of agreements between carriers and approval of mergers and acquisitions (§408), approval of relationships between officers and directors of air carriers (§409) and extensive control over other practices of air carriers.

Additionally, the Civil Aeronautics Act completely removes the field of safety regulation of all aircraft operations from State control and places it exclusively under the Federal Government. Federal safety regulations are

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far reaching and stringent, covering all safety aspects of flying, both intrastate and interstate.

No necessity exists for local economic regulation of interstate carriers, and there should be no doubt that the Congress intended in enacting the Civil Aeronautics Act to put interstate air carriers beyond the reach of State regulatory bodies. The Federal Government assumed the responsibility for the development of a national system of air transportation and has expended millions of dollars of the taxpayers' money in order to give this country the world's best air transport system. Economic regulation at State level could well serve to undermine the object sought to be obtained by the Congress.

There are marked statutory differences, indicative of the intent of the Congress concerning State power, between Federal legislation involving air carriers and other types of common carriers. Examples are Title 49, U. S. Code, Sections 1(2)(a), pertaining to railroads, 302(b), pertaining to motor carriers, and 903(j), and 903(k), pertaining to water carriers. The limitations set forth in those sections with regard to intrastate regulation are not to be found in the Civil Aeronautics Act.

The most revealing comparison pertains to the mail pay provisions in the Civil Aeronautics Act (49 U. S. Code, §486). Mail pay is premised on the other revenue of air carrier, including revenue from intrastate as well as interstate operations. If intrastate fares of interstate air carriers be subject to State control, it is evident that Federal control of mail pay would be thwarted.

This case is typical of the present conflict between State and Federal Governments in the field of regulating air carriers engaged in interstate commerce. The areas

of conflict will widen as the various States attempt to exert more power over the intrastate operations of interstate air carriers.

VI.

Conclusion.

The commerce clause either bars or does not bar state interference with the economic regulation of air transportation. By the Civil Aeronautics Act the Congress either intended or did not intend to preempt the field of economic regulation of air transportation. One answer to these questions imposes two masters, the other only a single master over the vital air transportation industry. The basic questions presented by this appeal are substantial and warrant plenary consideration by this Court.

Los Angeles, California, August 27, 1954.

Respectfully submitted,

HUGH W. DARLING,
DONALD K. HALL,
Counsel for Appellant.

D. P. RENDA, and
GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

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APPENDIX A.

Opinion of the Supreme Court of California.

In the Supreme Court of the State of California in Bank.

The People of the State of California, plaintiff and appellant, vs. Western Air Lines, Inc. (a corporation), defendant and respondent. L. A. No. 22881.

Filed Apr. 2, 1954.

This is an appeal from a judgment of dismissal after a demurrer to the complaint had been sustained without leave to amend.

The action was brought to enforce the penalty provisions of section 2107 of the Public Utilities Code. It was brought in the name of the People at the instance of the Public Utilities Commission as authorized by section 2104 of that code. Companion cases are People v. United Air Lines, Inc., S. F. No. 18,900, and People v. California Central Air Lines, L. A. No. 22,880, this day decided.

After setting forth the status of the Public Utilities Commission as a public agency operating under the Constitution and statutes of this state, the complaint proceeds to allege that pursuant to law the commission has at all times had jurisdiction over the rates, fares, charges and tariffs of all transportation companies, common carriers and public utilities operating within this state insofar as their intrastate operations are concerned; that the commission directed its attorney to institute this action; that the defendant is a Delaware corporation having its principal place of business in the county of Los Angeles; that at all times involved the defendant was engaged in the

intrastate transportation of passengers by air and furnishes such transportation for compensation to the public generally; that the defendant is a transportation company, a common carrier and a public utility by virtue of and within the contemplation and meaning of article XII of the state constitution, and of chapter 11 of part 1 of division 1 of the Public Utilities Code, as amended.

The complaint further alleges that on September 1, 1949, the defendant filed with the commission its Local Air Coach Passenger Tariff No. 1, establishing its rates for one-way adult air coach service between Los Angeles and San Francisco, California, at $13.60 and $27.20, one-way and round-trip, respectively; that under date of March 14, 1950, pursuant to investigation and hearing, the commission, by its order No. 43932 (49 Cal. P. U. C. 494) found fares for this service of $9.95 and $19.90, one way and round-trip, to be reasonable; that on April 14, 1950, the defendant filed its 3rd Revised Tariff No. 1 establishing these rates commencing June 1, 1950; that these were the lawful rates for this service until May 9, 1951; that effective May 9, 1951, the commission by its decision No. 45624 (50 Cal. P. U. C. 563) [dated April 24, 1951] authorized the defendant to increase the fares applicable to this service to $11.70 and $23.40, one-way and round-trip, respectively; and that the defendant had increased its rates for this service on March 1, 1951, without prior or any authorization, to $11.70 and $23.40, one-way and round-trip, respectively, and had demanded and received this rate for each of the 69 days thereafter, to and including May 8, 1951.

It is further alleged that by reason of these acts the defendant had incurred a penalty to the People in the sum

of $2,000 for each of the 69 days' violation of law, or a total penalty of $138,000. Judgment was prayed against the defendant in this sum, plus interest, costs of suit, and such other relief as to the court should appear just and proper in the premises.

The decision of the commission of April 24, 1951, No. 45624, was incorporated by reference in the complaint. It is there disclosed that this defendant, the United Air Lines, Inc., and California Central Airlines operated coach flights between the San Francisco Bay and the Los Angeles areas; that they had each made timely application to the commission to have rate increases to $11.70 and $23.40, one-way and round-trip, respectively, for this service approved as of March 1, 1951, but because sufficient data had not been furnished by them to the commission none of the applications had been granted as of that date. On March 6th the commission, on its own motion, ordered an investigation, and hearings were held as to the reasonableness, lawfulness and propriety of the fares of these companies for this San Francisco-Los Angeles air coach service. The carriers there challenged the jurisdiction of the commission to regulate in any respect the business of air transportation companies. Without waiving their objection to the jurisdiction of the commission they offered evidence to support the reasonableness of the increased fare and to show, in extenuation of their action, that the fare increase had been made in response to a request by the chairman of the federal Civil Aeronautics Board, which they believed to be compulsory upon them.

By its decision the commission determined that it had jurisdiction over transportation companies by virtue of Sections 20 and 22 of article XII of the state constitu-

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tion; that this jurisdiction extended to air transportation companies; that the Civil Aeronautics Act has not purported to extend economic regulation to intrastate transportation of persons or property by air other than mail, and that the state was free to regulate intrastate rates and fares of air carriers to the same extent as it regulates intrastate rates of railroads, trucking and bus companies, and telephone and telegraph utilities. It found that the fare increases in question were justified and would be authorized "for the future" and that reparations should be made to passengers who had paid the excess fare since March 1, 1951. The decision expressly advised the companies that they would thereafter be deemed to be transportation companies, common carriers and public utilities within the meaning of the state constitution and be subject to its prohibitions and requirements. It specifically called their attention to the provisions of section 76(a) of the Public Utilities Act, which provided as follows:*

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, . . . to obey . . . any order . . . of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

The order was made effective as of May 9, 1951, 15 days after its date. Defendant's petition for review was denied by an order of this court on August 2, 1951, without opinion. A petition for rehearing was denied August

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*This section was re-enacted in 1951 as section 2107 of the Public Utilities Code with no substantial change.

30, 1951. The United States Supreme Court on January 7, 1952, dismissed an appeal from the order denying the writ (342 U. S. 908) "for want of a substantial federal question."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject matter of the action; that the plaintiff has not the legal capacity to sue; and that the complaint is uncertain, ambiguous and unintelligible in that it cannot be ascertained therefrom under what law the defendant has incurred a penalty to the People.

The special demurrer is without merit and will receive no further notice. The jurisdiction of the superior court to entertain the action and the right of the commission to direct its prosecution are supplied by section 2104 of the Public Utilities Code. The consideration of the general demurrer will dispose of the pertinent questions raised on the appeal.

At the outset it is urged by the plaintiff that the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action. These include the determination (1) that the commission had jurisdiction to fix the intrastate fares of the defendant; (2) that the status of the defendant is that of a public utility subject to regulation as contemplated by the constitution of this state; and (3) that the Civil Aeronautics Act of 1938, as amended, has not deprived this state of the power, through the commission, to regulate the defendant's intrastate fares.

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The determination as to these three questions was made, the plaintiff asserts, in the exercise by the commission of its judicial power, and was and is to that extent as conclusive as would be a final judgment of a court of record.

Under the constitution and statutes of this state the commission is possessed of broad and comprehensive powers. It has wide administrative powers. It has legislative powers, such, for example, as the fixing of rates of public utilities, the exercise of which is prospective in operation and legislative in character. (Southern Pacific Co. v. R. Com., 194 Cal. 734, 739.) That it also possesses judicial powers may not be questioned. (People v. Lang Transportation Co., 217 Cal. 166, 170.) When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings. (§1709, Pub. Util. Code.) Direct attack is made available by application for writ of review to this court in accordance with the provisions of section 1756 of the Public Utilities Code. We are not herein dealing with a determination of the commission made in the exercise of its judicial power where no direct attack, on constitutional or other grounds, has been made within the time provided by section 1756. However, it seems clear that where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties. (Sunshine Coal Co. v. Adkins, 310 U. S. 381.)

Whether the order of the Supreme Court of the United States dismissing the appeal of the defendant "for want

of a substantial federal question" is *res judicata* in that court on the question of alleged federal control of intrastate rates, is not for this court to decide. It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (Southern California Edison Co. v. R. Com., 6 Cal. 2d 737, 747.) This is so even though the order of this court is without opinion. (Napa Valley Electric Co. v. R. Com., 251 U. S. 366.) In the last cited case it was held at pages 372 and 373 that a denial by this court of an application for a writ of review is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California"; that the "absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company," and that it was "a final judicial determination" and "as effectual as an estoppel as would have been a formal judgment upon issues of fact." (See also Funeral Dir. Ass'n v. Bd. of Fun. Directors, 22 Cal. 2d 104, 107, 108; Sou. Calif. Edison Co. v. R. Com., *supra*, 6 Cal. 2d 737, 747; People v. Hadley, 66 Cal. App. 370, 375; Southern Pacific Co. v. Van Hoosear, 72 Fed. 2d 903; Consolidated Freightways v. R. Com., 36 F. Supp. 269, 270 (1951); Adams v. Decoto, 21 F. 2d 221 (1927).)

The defendant relies on the case of Stratton v. Railroad Commission, 186 Cal. 119, which contains declarations that appear to be contrary to other and later de-

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cisions of the courts on the subject. It was said in that case at page 126 that "the commission is not a judicial tribunal in the strict sense." That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state. It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in matters coming before it. This takes place, for example, when the commission on its own motion issues an order directing some person, firm or corporation within its regulatory jurisdiction to show cause why it should not be required to perform or not perform a certain designated act or be subject to discipline for performing an act contrary to law or public utility regulation. The proceeding may take on the character of an adversary proceeding in which the commission furnishes evidence, judicially passes upon the competence and weight of that evidence and makes an order based upon it. This kind of establishment was seriously criticized in its early stages by those affected by it. But it is the law that when the system has been duly authorized by the constitution of the state and the procedure is such as to satisfy the requirements of due process, both state and federal, no valid objection can be made to it. Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. (See Southern Pacific Co. v. Public Utilities Commission, 1953, 41 A. C. 362, 377.) When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court. And of course no law of this state could deprive a party whose rights were prejudicially

affected of the right to apply to the Supreme Court of the United States for relief on federal constitutional grounds.

So, while it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power.

It was also said in the Stratton case that "the commission is essentially an administrative and legislative tribunal, and not a court," and the fact that the commission must make determinations of fact for its own guidance "does not make it a court or change the character of its decrees from administrative or legislative orders into judicial judgments." These and other statements in the opinion in that case are inconsistent with the decisions of this court both before and after it on the subject of the judicial power of the commission. Insofar as they are so inconsistent they are overruled.

There can be no question but that the commission exercised its judicial power in determining the three matters above referred to. They were involved and extensively presented to the commission in the prior proceedings and to this court on the application for the writ of review. They are at issue in the present case. The subject matter of the two proceedings is to that extent the same. The parties are essentially the same. (Sunshine Coal Co. v. Adkins, *supra*, 310 U. S. 381, 402.) The fact that other matters are also involved in the present case, such as the validity, force and effect of section 2107 of the Public Utilities Code, and the question whether the constitution itself prohibits certain designated action by public utilities, does not detract from the effect of those determinations as conclusive insofar as this case is concerned. (See

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Dillard v. McKnight, 34 Cal. 2d 209, 214, 215; Bernhard v. Bank of America, 19 Cal. 2d 807, 811-813; Todhunter v. Smith, 219 Cal. 690, 695.)

That conclusiveness arises by operation of law. It is the order and not the reasons for it that establishes its effectiveness. (Bank of Visalia v. Smith, 146 Cal. 398, 402; 15 Cal. Jur. 66, 98-99, §167.) Attention is again called to the fact that when this court denied the writ of review in the prior proceedings no reasons for the order were given. Since the conclusions on this appeal with reference to the three stated questions are to be the same as those which to that extent formed the basis for the order denying the writ, and the judgment herein is to be reversed, it is deemed desirable to state all of the reasons for the reversal including those which led to the denial of the writ, to the end that none of the reasons for such denial be left to implication or conjecture.

In order to determine whether the defendant is amenable to state rate regulation under the provisions of the constitution and statutes as alleged in the complaint it is necessary to look first to the constitution. As adopted in 1879, section 22 of article XII provided for the election of three Railroad Commissioners and stated in part: "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies . . . ." In 1911 this section was amended to create a Railroad Commission in lieu of the former commission, and to provide:

> "* * * Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other

transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation * * * between the points named in any tariff of rates, established by said commission, than the rates * * * which are specified in such tariff * * *."

Also added to this section in 1911 was the declaration:

"No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the * * * commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution."

In 1946 section 22 was again amended, continuing the "Railroad Commission" in existence as the "Public Utilities Commission." The portions of the section above quoted were unchanged.

The commission is therefore a regulatory body of constitutional origin, deriving certain of its powers by direct grant from the constitution which created it. (Pacific Tel. etc. Co. v. Eshleman (1913), 166 Cal. 640; Morel v. R. Com. (1938), 11 Cal. 2d 488.) The legislature is given plenary power to confer other powers upon the commission. (§§22 and 23, Art. XII.) As to the scope of those powers we look to the legislation enacted in the exercise of that power, principally the Public Utilities Code, and to the decisions of this court in construing them. Such additional powers "must be cognate and germane to the regulation of public utilities, and when the power

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thus conferred relates to the regulation of transportation companies, it must be cognate and germane to the regulation of railroads or other transportation companies that are in fact common carriers. [Citing cases.]" (Morel v. R. Com., *supra*, 11 Cal. 2d 488, 492.)

Section 20 of article XII as originally adopted in 1879 prohibited any railroad company "or other common carrier" from combining or contracting with another "common carrier" to have the earnings of one doing the carrying shared by the other not doing the carrying, and provided that whenever a railroad corporation should lower its rates of fare for the purpose of competing with any other common carrier, such reduced rate should not again be raised from that standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights. In 1911 this section was amended to read:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the * * * commission provided for in this constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property."

Sections 20 and 22 directly confer upon the commission power over the rates of "transportation companies" and section 20 directly prohibits such companies from increasing their rates without commission authorization. The next inquiry is whether this defendant is a "transportation company" within the meaning of these sections.

From earlier times rates for the transportation of persons and property for hire as common carriers have been subject to government regulation and control. (Munn v. Illinois, 94 U. S. 113, 125; People v. Budd, 117 N. Y. 1.) In matters within the jurisdiction of a state, such control has existed in California almost from our beginning. While administrative bodies at first were concerned with railroads and their associated activities, the language employed in article XII of the Constitution of 1879, and subsequent amendments, clearly indicates the intention and purpose that such controls should extend not merely to "railroads" but to "railroads and other transportation companies." This latter phrase is so frequently employed in article XII as to leave no doubt as to its enlarging effect.

The fact that airline transportation companies were not in existence when the constitution was adopted in 1879 does not make them any the less "transportation companies" within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in State ex Rel. State Railway Com. v. Ramsey (1949), 151 Neb. 333, at page 338: "* * * A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; 11 Am. Jur., Constitutional Law, §51, p. 660; 9 Am. Jur., Carriers,

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§4, p. 430. These principles have been held to be applicable to transportation by air. 'Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result.' Curtiss-Wright Flying Service v. Glose, 66 Fed. 2d 710, certiorari denied 290 U. S. 696, * * * [citations omitted]."

The question in regard to each new type of transportation is whether the constitution excludes by necessary or even by fair implication all control over transportation companies of the character here involved.

Section 17 of article XII of the Constitution provides:

> "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control . . . ."

Section 23, as adopted and unchanged by the 1914 amendment, provides:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, * * * within this State, for the transportation or conveyance of passengers * * * or freight of any kind, * * * either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the * * * Commission as may be provided by the Legislature, and every class of private corporations, individuals, or association of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The * * * Commission shall have and exercise such power and

> jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the * * * Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * * Nothing in this section shall be construed as a limitation upon any power conferred upon the * * * Commission by any provision of this Constitution now existing or adopted concurrently herewith."

This section as originally adopted in 1879 merely provided for the districting of the state into three districts.

The comprehensive grant of power over rates conferred upon the commission by sections 20 and 22 is not nullified or limited by the language appearing in sections 17 and 23 to the effect that such rates are "subject to legislative control." The provisions of these sections are not out of harmony, but if there is any doubt about it the special provisions of sections 20 and 22 should prevail over the general provisions of sections 17 and 23. The concluding sentence of section 23 confirms this conclusion. Under familiar rules of construction, if it is impossible to harmonize or reconcile portions of a constitution, special provisions control more general provisions, and the general and special provisions operate together, neither working the repeal of the other. (Martin v. Election Comrs., 126 Cal. 404; 11 Cal. Jur. 2d 352-3; 11 Am. Jur. 663.) Recourse may be had to the whole instrument to ascertain the intent and purpose of its provisions and it should, if possible, be construed so as to avoid a repugnancy.

The defendant urges that the provisions of section 20 and 22 are too vague to be self-executing, and that the legislature has not provided any implementing legislation. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced * * *." (Cooley's Const. Limitations, 8th Ed., p. 167.)

Although a constitutional provision may be self-executing the legislature may enact legislation to facilitate the exercise of the powers directly granted by the Constitution. (Chesney v. Bryan, 1940, 15 Cal. 2d 460, 463.) "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant." (Western Assn. etc. R. R. v. R. Com. (1946), 173 Cal. 802, 804.)

Furthermore, the omission of any express sanctions in article XII for enforcing the provisions of sections 20 and 22 does not justify the conclusion that those sections were not intended to be self-executing. Section 22 of article XII as adopted in 1879 directly imposed penalties, drastic ones, upon corporations and their officers, agents or employees for violation of the constitutional prohibitions against unauthorized rates, discrimination, etc. It is true that the 1911 amendment omitted these express sanctions. But the prohibitions of section 20 were added at that same time. Such prohibitions were

not left to the discretion of the legislature. No legislation was required to make the constitutional language more prohibitory and no legislation enacted could limit or detract from it. (Oakland Paving Co. v. Hilton, 69 Cal. 479, 483.) But to aid in its enforcement section 24 of article XII has at all times provided as follows: "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article." Sections 20, 22 and 23 are a part of that article. This action was filed against the defendant because it violated the prohibitions of article XII and section 2107 of the Public Utilities Code was reenacted pursuant to the mandatory duty of the legislature to pass all laws necessary to carry into effect the constitutional purpose.

Defendant urges that the legislature did not intend an air carrier to be included within the category of a "public utility" for the purposes of section 2107 or of any other part of the Public Utilities Code and that, therefore, the penalties prescribed in section 2107 are not applicable to and cannot be imposed upon it. Legislative intent should be determined from the language of the statute. Significance should be given, if possible, to every word, phrase, sentence and part of an act. (Gates v. Salmon, 35 Cal. 576.) When a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts. (Rideaux v. Torgrimson, 12 Cal. 2d 633; *In re* Monrovia Evening Post, 199 Cal. 263.) Section 203 of the Public Utilities Code states: "Unless the context otherwise requires, the

definitions and general provisions set forth in this chapter govern the construction of this part." The term "transportation companies" is nowhere defined in the code nor is there any specific reference therein to airline carriers. Section 211 defines "Common Carrier"* and section 216 defines "public Utility."** Each definition states that it "includes" the corporations thereafter enumerated.

The term "includes" is ordinarily a word of enlargement and not of limitation. (Oil Workers Int. Union v. Superior Ct., 103 Cal. App. 2d 512, 570.) The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions. (Gray v. Powell, 314 U. S. 402.) The definitions contained in sections 211 and 216 of the Public Utilities Code do not appear to be limited to the inclusions. Section 216(a) leaves open for consideration what other types of entities are embraced within the words "Public

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*§211. "Common carrier" includes:

(a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading, and every other car corporation or person operating for compensation within this State.

(b) Every corporation or person, owning, controlling, operating or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State . . .

(c) Every "passenger stage corporation" operating within this State.

(d) Every highway common carrier and every petroleum irregular route carrier operating within this State.

**§216. (a) "Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

Utility" when used in a particular context. (§203, Pub. Util. Code.) Section 2107 subjects to penalties any public utility which violates "any provision of the Constitution of this State or of this part." To hold that this section applies only to public utilities enumerated in the definition of "Public Utility" or "Common Carrier" would ignore the words "of the Constitution" contained therein and would violate the letter and purpose of chapter 11 on violations, of which section 2107 is a part. Section 2101 commands the commission to see that the provisions of the Constitution affecting public utilities and violations thereof are promptly prosecuted. Other sections of that chapter provide the machinery for the prosecution of such offenses and the collection of penalties. Chapter 11 indicates an awareness by the legislature of its duty to provide for the enforcement of the constitutional provisions and its intention to fix the punishment for such violations.

Confusion is asserted to have resulted from divergent holdings of this court on the question whether a carrier which is in fact a common carrier transportation company should be subject to rate regulation by the commission although not specifically mentioned in the Constitution or the statute. This question was raised in 1901 in Railroad Commissioners v. Market St. Ry. Co., 132 Cal. 677. In that case the commission sought to compel the Market Street Railway Company to submit its records to the commission for regulatory purposes. The proceeding involved a combination of the constitutional sections as adopted in 1879 and an act of the legislature passed April 15, 1880, which specially excluded a street railroad from the definition of a "transportation company" as that term was used in the Constitution. It was held that a

street railway company had not been specially named in the Constitution; that under the statute a street railway company operating within a municipality was not a transportation company within the meaning of the Constitution and was therefore not subject to regulatory control by the commission. Obviously that case is not applicable here.

The scope of the regulatory powers of the commission under the Constitution as amended in 1911 was considered in 1916 in Western Association of Short Line Railroads v. Railroad Commission, *supra,* 173 Cal. 802. In that case the association, consisting of some fifteen railroads, filed a petition with the commission seeking to have it assume the regulation of certain motor truck and transportation companies conveying freight and passengers on the public highways as common carriers. The commission declined to entertain the petition on the ground that the law had not vested in it the power to do so. Mandamus was sought to compel the commission to assume jurisdiction. It appeared that the freight truck lines and the electric and motor bus passenger conveyances were transportation companies and common carriers operating intercity. It was held that notwithstanding the fact that they were not specifically mentioned in the Constitution or the statutes they were undeniably public utilities and subject to the regulatory power of the commission. It was said at page 808 with regard to motor trucks and stages, that "nothing in the language of the grant excludes them, and no legitimate construction upon the phrase so oft quoted demands their exclusion. It must be and therefore is held that the constitution has granted regulatory powers over such corporations to the * * * commission by virtue of section 22, article XII,

of the constitution * * *" The Market Street Railway case was distinguished on the ground that that company was operating within a municipality and was not under the law subject to the commission's power of regulation.

The question of the power of the commission to regulate rates of taxicab companies operating wholly within a municipality required the attention of this court in *In re* Martinez, 22 Cal. 2d 259. The question there was whether the fares of taxicabs so operating were subject to regulation by the commission or pursuant to the provisions of a city ordinance. In that proceeding in habeas corpus the commission, as *amicus curiae,* stated that it had consistently taken the position that its jurisdiction pursuant to statutes enacted under the authority of Section 23 of the Constitution did not extend to the regulation of local taxicabs and for that reason it had never attempted to regulate their operations. This court concurred in that view and also held that consistently therewith there was a legislative intent to exempt taxicabs from state regulation. The court discharged the writ. An additional reason for the order was stated to be that no authorization in the commission to regulate taxicab fares could be found in the statute because taxicabs were not specially mentioned therein as common carriers. There was no occasion to indicate in that case that a private corporation, admittedly and conclusively shown to be in fact a transportation company, a statewide common carrier of passengers for hire, and a public utility, should be freed from regulation as to its intrastate rates pursuant to the grant of power to the commission under Section 22 merely because it was not specifically named as

such in that section or in the statute passed by the legislature under the authority of Section 23.

The argument of the defendant that the specific references in Article XII to "railroads and other transportation companies" must for certainty limit the "other transportation companies" mentioned to ground carriers, is without merit. Airline carriers, like motor trucks and automobile stages, are forms of transportation unknown at the time the Constitution was adopted, and whether or not the legislature has since that time acted with reference to them, they are within the regulatory powers of the commission under the principles laid down in the Short Line Railroad cases.

It follows that the defendant air carrier is a public utility within the ordinarily accepted meaning of that term and within the meaning and contemplation of Sections 20 and 22 of Article XII of the Constitution. It has violated the prohibitions of Section 20 of that article. It is therefore subject to the penalties of Section 2107 for violation of the constitutional provision.

Our conclusions in the present case are in accord with the determinations of this court in 1916 in the Short Line Railroad cases and with the holding in the proceedings wherein this court in August, 1951, denied the petition of this defendant for a writ of review to annul the order of the commission. Anything in the Martinez case which is out of harmony with these conclusions is overruled.

In further support of its demurrer the defendant argues that the provisions of Section 2107 as applied to it are unreasonable and oppressive and therefore in violation of the due process and the equal protection clauses of the Federal Constitution, citing *Ex parte* Young, 209 U. S.

123; Cotting v. Kansas City Stock Yards, 183 U. S. 79; Beckler Produce Co. v. American Ry. Exp. Co., 156 Ark. 296; and National Gas Pipeline Co. v. Slattery, 302 U. S. 300. There is no merit in this contention. The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties. It could have obtained a determination of its rights and obligations under California law without exposing itself to the risk of penalties.

No showing is made that the penalties prescribed by Section 2107, $500 to $2000 a day, are oppressive. While factors in extenuation of defendant's action may be considered by the trial court in determining the merits of this controversy, they are not proper matters for consideration on this appeal. It is observed, moreover, that under Section 2104 of the Public Utilities Code, the action may be "compromised or discontinued on application of the commission upon such terms as the court approves * * *"

It is further contended by the defendant that any regulation of air carriers by states is barred by the Civil Aeronautics Act of 1938, as amended (52 Stats. 977, 49 U. S. Code §401 *et seq.*), and is against the national interest. This question was squarely raised in the hearings before the commission in the prior proceedings and was determined by the commission and by this court contrary to the contention. It formed one of the bases of the appeal to the Supreme Court of the United States. The jurisdictional statement on that appeal recited the issues there to be: "(1) Has the Civil Aeronautics Act of 1938, as amended, pre-empted the entire field of civil aviation to the exclusion of the right or power of any

state or state agency to exercise jurisdiction or authority over commercial air transportation" and "(2) Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an [intrastate] segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of subsection 3 of Section 8, Article I of the Constitution of the United States?" (See Jurisdictional Statement, Western Air Lines, Inc., Petitioner, v. Pub. Util. Com. of the State of California, Respondent, S. F. No. 18427, p. 13.) That appeal was dismissed by the Supreme Court "for the want of a substantial federal question." (342 U. S. 908.) Mr. Justice Black and Mr. Justice Burton were of the opinion that probable jurisdiction should be noted. While it would seem that the right of the state commission to regulate the intrastate rates of this defendant and of others similarly situated has been judicially established and that this might be sufficient for the determination of this issue so far as this court is concerned, again we prefer, in view of the present arguments, to state the reasons why the defendant's contentions are not persuasive.

It appears beyond question that the power of Congress under the commerce clause extends to the regulation of "modes of interstate commerce unknown to the fathers" (*In re* Debs, Petitioner, 158 U. S. 564, 591) and includes the regulation of the interstate operation of air carriers. The extent to which Congress has asserted such jurisdiction over civil aviation depends upon the terms of the legislation which it has adopted. This legislation is chiefly embodied in the Civil Aeronautics Act of 1938, as amended. A review of that act indicates that two kinds of jurisdiction have been asserted by Congress,—one over safety

factors, the other over economic factors. We are not here concerned with the provisions of the act applicable to safety regulations except to note that the extent of federal jurisdiction over those factors (§§601-610, 49 U. S. Code §§581-590) seems to be based on the definition of "air commerce" contained in section 1(3) (49 U. S. C. §401 (3), 1940)). It is there provided: " 'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

The jurisdiction asserted by Congress in the local economic regulatory field is not covered. Section 1 (2) (49 U. S. C. §401(2)) defines "air carrier" as one engaged in "air transportation." "Air transportation" is defined in section 1(10) (49 U. S. C. §401(10)) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." "Interstate air transportation" is defined by section 1(21) (49 U. S. C. §401(21)) to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively,

> (a) a place in any State of the United States. of the District of Columbia, and a place in any other State * * * or between places in the same State of the United States through the air space over any place outside thereof * * *
>
> (b) a place in any State of the United States * * * and any place in a Territory or possession of the United States * * *

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(c) a place in the United States and any place outside thereof * * *"

Sections 601-610 (49 U. S. Code §§581-590) state the jurisdiction asserted over safety factors of air carrier regulation; sections 401-406 (49 U. S. Code §§481-496) over economic factors. Rates and tariffs are controlled by the latter sections. Under those provisions and the definitions contained in section 1 (49 U. S. Code §401) it seems clear that Congress has not sought to extend the economic regulation of the board to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates.

Defendant urges that Section 401(2) (49 U. S. C. §481(2)) is of special significance on the question of the jurisdiction of the board over intrastate rates because it authorizes the issuance of certificates of public convenience and necessity for the transportation of mail and all other classes of traffic for which authorization is sought between such points as "from Brownsville, Texas . . . to San Antonio, Texas." Obviously that section pertains to the necessity of federal certification. No question is here presented or determined as to the effect of this provision upon state certification; and the requirement of federal certification does not necessarily preclude state control of intrastate rates. The same observation applies to the provisions of section 403 (49 U. S. C. §483) requiring air carriers to file tariffs with the board, of section 404 (49 U. S. C. §484) requiring the observance of reasonable rates and charges, and of section 406

(49 U. S. C. §486) empowering the board to fix the compensation to be paid to air carriers for the transportation of mail. The latter section authorizes the board to take into consideration "all other revenue of the air carrier" in determining the "need" of such carrier for compensation for carrying the mail to enable it under "honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." This language does not make it imperative that the board have exclusive control of "all other revenue." The only mandate is that it shall take all other revenue [including intrastate revenue] into consideration.

There is no language indicating that Congress intended to pre-empt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the airspace outside of the state. We are not concerned on this appeal with the question whether Congress could properly assert such power. There appear to have been no decisions of the United States Supreme Court defining the limits of such regulatory control.

Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of the Civil Aeronautics Act of 1938 seeking to extend federal economic regulation to include intrastate

operations of air carriers, and also to the fact that none of these has been enacted into law.* This would seem to strengthen the conclusion that Congress has not assumed control over carriers to the exclusion of state control as to their intrastate rates.

Any doubts on the subject should be resolved in favor of state power for the principal reason, as stated, that the regulation of intrastate fares of common carriers traditionally has been subject to state regulation. It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938, such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. (See Sec. 1(2) Interstate Commerce Act, (49 U. S. Code §1 (railroads); §202(b) Part II. Interstate Commerce Act (49 U. S. C. §302) (motor carriers); §303(j) Part III, Interstate Commerce Act (49 U. S. C. §903) (water carriers).) The failure to use such language in the Civil Aeronautics Act does not necessarily imply that federal regulation of

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*Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (Jan. 30, 1935) 237-239;

78th Congress: Lea-Bailey Aviation Bill introduced as H. R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill, S. 541; Lea Bill, H. R. 3383.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

See also 1944 Natl Assn RR and Util. Comrs. Proceedings 221; 1945, *id.* p. 299; 1946, p. 210; 1947, p. 128; 1948, p. 69; 1949, p. 166; 1950, p. 106.

air transportation was intended to exclude all state control. Railroads and motor carriers began as short-haul carriers. In their operations wholly within a state they have been traditionally subject to state regulation. In the early days of aviation the operating costs and necessarily the fares of the pioneering airlines were very high and as a consequence they could compete with surface carriers only on long hauls.* Consequently air transportation in this country has been predominantly interstate and as such subject to federal control.

Also of significance in considering the extent of Congressional action is the attitude of the Civil Aeronautics Board in the exercise of its power under the act. As stated this defendant and the other carriers concerned had put the questioned increase in fares into effect on March 1, 1951, without commission authorization because they had been requested to make such increase as of that date by the chairman of the Civil Aeronautics Board and they had considered his request to be tantamount to a demand. In the proceedings subsequently initiated by the commission the carriers denied jurisdiction on the part of the commission over their rates and asserted the exclusive jurisdiction of the board. On the appeal to the United States Supreme Court from our order denying a writ of review the question whether the board had exclusive jurisdiction was precisely in issue. The board apparently did not have sufficient interest to intervene. The commission states that in more recent litigation in which the board did intervene (United Air Line v. Pub. Util. Com. of California, 74 Sup. Ct. 151, Nov. 30, 1953) it has

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*See 11 Law & Contemporary Problems (1946), p. 429, at pp. 459 *et seq.* and pp. 488 *et seq.* for a symposium on this problem.

indicated its present attitude that its jurisdiction does not extend to intrastate rates.

Since 1938 the carriers authorized to transport passengers by air between the mainland of California and Santa Catalina Island have been subject to detailed regulatory control by the federal board. Tariffs for those operations were filed with that board but had never been filed with or required by the state commission. Santa Catalina Island lies about 30 miles westward of the mainland and is a part of California. In September and December, 1951, the commission requested United Air Lines to file tariffs with it, asserting that the Catalina operations were not within the coverage of the Civil Aeronautics Act but were intrastate and subject to state regulation. No formal order was issued by the commission. In June, 1952, United Air Lines and Catalina Air Transport, a corporation, joined in a complaint filed in the United States District Court for the Southern District of California praying for declaratory and injunctive relief, alleging that the California commission was threatening to bring penalty and reparation proceedings against them. The board intervened for the purpose of asserting its exclusive jurisdiction. A three judge court ordered an injunction, upholding the exclusive jurisdiction of the board. That judgment was reversed by the Supreme Court (74 Sup. Ct. 151, Nov. 30, 1953) on technical grounds, citing Public Service Commission of Utah v. Wycoff, 344 U. S. 237. However in the brief on appeal filed on behalf of the board it was stated that there "is no issue here presented of whether the Civil Aeronautics Act would pre-empt the field of economic regulation of the Catalina operations if those operations involved only flights over California territory, as, for example, do flights between Los Angeles

and San Francisco. United Air Lines v. Public Utilities Commission of California, 342 U. S. 908, where this Court dismissed an appeal from a rate order of the California Commission for want of a substantial federal question, involved air transportation between Los Angeles and San Francisco only, and is inapposite here." (Brief of Appellee Civil Aeronautics Board, p. 13.)

The argument that the interests of the United States require national uniformity in the regulation of air transportation through the total exclusion of state control is addressed to a matter of public policy which requires no consideration here.

From the foregoing it follows that the demurrer was improperly sustained.

Judgment reversed.

SHENK, *J.*

We Concur:

GIBSON, *C. J.*

CARTER, *J.*

TRAYNOR, *J.*

SPENCE, *J.*

DISSENTING OPINION BY SCHAUER, J., TO OPINION BY SHENK, J.

It is my view that the opinions prepared for the District Court of Appeal in the companion cases of People v. United Air Lines, Inc. (reported at 258 P. 2d 66), authored by Justice Wood[1] (Fred B.) and concurred in by Presiding Justice Peters and Justice Bray, and of People v. California Central Airlines (reported at 258 P. 2d 577), authored by Justice Drapeau and concurred in by Presiding Justice White and Justice Doran, adequately discuss and correctly resolve the issues which are presented on this appeal.

By reference I adopt each of such opinions in its entirety but to the end of avoiding unnecessary repetition in this dissent of either factual statement[2] or discussion of law, while at the same time making clear the grounds which I find compelling to the conclusion reached, I set out here only the following portions of the opinion prepared by Mr. Justice Wood (pp. 68-71 of 258 P. 2d):

"The sole issue upon this appeal is whether or not this defendant by charging the increased rates mentioned, during the period March 1 to May 8, 1951, incurred penalties which under certain circumstances the provisions of §2107 of the Public Utilities Code by its terms imposes. That section declares that 'Any *public utility* which violates or fails to comply with any provision of the *Constitution* of this State or of this part [§§ 2101 to 2113; the Public

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[1]Formerly Legislative Counsel to the Legislature of California, with a long and distinguished service in the field of statutory interpretation.

[2]The material allegations of the complaint are correctly stated in the majority opinion of this court.

Utilities Code], or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense.[3] (Emphasis added.)

"The key words in this section are 'public utility.' Unless defendant is a 'public utility,' as that term is used in §2107, it cannot be subject to the penalty which that section imposes.[4]

"For a definition, we turn to §216 of the code. It states that '"Public utility" includes every common carrier, toll bridge corporation, * * * [and a number of types of corporations other than transportation companies] * * * where the service is performed for or the commodity delivered to the public or any portion thereof. * * *'

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[3]"§2108 of the code states that every such violation is a separate and distinct offense, 'and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.'"

[4]"During oral argument counsel for plaintiff expressed the view that the clause of §2107 in which the word 'Constitution' appears makes the penalty applicable to a 'transportation company' which violates any provision of Article XII even if such company is not a 'public utility' within the meaning of that term as used in the code.

"Logic is against such a view. The word 'Constitution,' appearing, as it does, in the object of the sentence, in no way changes or enlarges the meaning of the subject, 'any public utility.' Especially so in view of the fact that such a change is not necessary to give meaning and effect to the phrase in which the word 'Constitution' occurs. Numerous transportation agencies that are included in the code concept of 'public utility' are subject to the constitutional mandates and prohibitions as well as to those expressed in the code.

"Moreover, it would have been easy to broaden the subject of the sentence in §2107 by adding 'corporation or person' to 'public utility,' as was done in §2113 of the code, when the legislature was dealing with contempt of any order of the commission."

"Here the key words are 'common carrier,' defined in §211 of the code as follows: ' "Common carrier" includes: (a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder * * * [several types of car corporations] * * * operating for compensation within this State. (b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. "Inland waters" as used in this section includes all navigable waters within this State other than the high seas. (c) Every "passenger stage corporation" operating within this State. (d) Every highway common carrier and every petroleum irregular route carrier operating within this State.'

"In this definition of 'common carrier' there is no specific mention of common carrier by air. It is true that this enumeration of carriers is preceded by the word 'includes,' which ordinarily is used by way of illustration or enlargement, not by way of limitation. Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512, 570, 230 P. 2d 71, and cases there cited. Here, however, it appears that 'includes' is used as a word of limitation. The enumeration of several types of common carriers (railroad, street railroad, vessels, passenger stage corporations, highway common carriers) suggests an intention to include only the carrier specifically mentioned. The history of this section, which finds its prototype in subdivision *(1)* of Section 2 of the Public Utilities Act of December 23, 1911, Stats. 1911, Ex. Sess., ch. 14, p. 18, at pp. 19-20, compels such a conclusion.

"To get the full significance of this history, we start with the state Constitution of 1879, which imposed certain obligations upon carriers for hire and used certain terms in referring to them. Section 21 of Article XII prohibited discrimination in charges or facilities for transportation by any 'railroad or other transportation company.' Section 22 of Article XII gave the railroad commission power to establish rates of charges for transportation of passengers and freight by 'railroad or other transportation companies'; implemented by the power to examine books of such companies, issue subpoenas and other process, hear and determine complaints against such companies, take testimony, and punish for contempt. Section 19 of Article XII declared that no 'railroad or other transportation company' shall grant free passes or tickets at a discount to any public officer other than a railroad commissioner. Section 17 of Article XII said: 'All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control.' Section 18 used the expression 'railroad or canal company'; section 20, 'railroad company or other common carrier.'

"An Act of April 15, 1880, evidently designed to implement these provisions of the new Constitution, followed the pattern set by these sections of Article XII, in the terms which it used. Thus, the 1880 act used the term 'transportation companies,' defining it, somewhat narrowly, to mean and include companies operating railroads (other than street railroad) or steamboats from port to port or upon the rivers and inland waters. Stats. 1880, ch. 59, §14, p. 45, at 48. However, section 12 of this Act was designed to implement the constitutional powers and duties of the railroad commission to the full extent

of the constitutional grant, without limitation as to types of companies affected. P. 48.

"The Railroad Commission Act of March 19, 1909, continued to use the expression 'transportation company,' enlarging it to include 'railroads operated for commercial purposes, express companies, sleeping car companies, and companies operating vessels engaged in carrying freight or passengers on the waters of this state.' Stats. 1909, c. 312, p. 499, §11, p. 501.

"The Railroad Commission Act of February 9, 1911, followed much the same pattern. Stats. 1911, Reg. Sess., c. 20, p. 13. In section 9 it declared: 'All railroad and other transportation companies, owned or operated by any individual, company, * * * or association are hereby declared to be common carriers, and under the jurisdiction, * * * of the commission and subject to the provisions of this act.' P. 16. But it continued to define 'transportation company' as meaning and including certain specified kinds of companies, adding several types of car companies. §13, p. 17. It imposed a penalty of $500 to $2,000 per day for willful failure by any railroad or other transportation company to comply with certain requirements of the statute or failure strictly to observe any rate established by the commission. §41, p. 36.

"At the special election held in October, 1911, the voters approved amendments to sections 20, 21, 22, and 23 of Article XII of the Constitution. These amendments enlarged the membership of the Railroad Commission from three to five, made the members appointive instead of

elective, and to some extent enlarged the constitutional grant of power to the commission, including the power to order reparation to any shipper for excessive or discriminatory rates charged him. In so doing it retained the use of the expression 'railroad or other transportation company' when dealing with the direct grant of constitutional power to the commission. Significantly, these amendments used a different form of expression when conferring 'plenary power' upon the Legislature to confer additional powers upon the commission. The 1911 amendment to section 23 declared that every private corporation, individual, or association owning or operating a 'commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, * * * for the transportation or conveyance of passengers * * * express * * * or freight * * *, or for the transmission of telephone or telegraph messages, or for the production, * * * or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, * * * to or for the public, *and every common carrier,* is hereby declared to be *a public utility subject to such control and regulation* by the railroad commission *as may be provided by the legislature,* and *every class* of private corporations, * * * *hereafter declared by the legislature to be public utilities* shall likewise be subject to such control and regulation.' (Emphasis added.)

"We may assume, for the present purposes, that 'common carrier' as thus used in section 23 meant the same as defined in section 17 of the same article: 'All railroad,

canal, and other transportation companies.' We may further assume, for the purpose of discussion, that airline transportation companies were included in this definition of common carrier,[5] and hence, that a common carrier by air is a 'public utility' which section 23 gives the legislature power to subject to the control and regulation of the commission. Has the legislature done so, with this type of transportation company? The answer is furnished by the Public Utilities Act of December 4, 1911, the first statute on this subject enacted after the adoption of the 1911 constitutional amendments. Stats. 1911, Ex. Sess., c. 14, p. 18. Of prime significance, is the fact that the express 'transportation company' was neither defined nor used in that act. We there find the same pattern that now obtains in the code. 'Common carrier' was defined by subdivision (1) of section 2 of the Act as including certain specific types of transportation agencies (such as railroad corporations, street railroad corporations, car corporations, corporations operating vessels) without the use of 'transportation company' or other generic term. 'Public utility' was defined in subdivision (bb) of section 2 of that Act as including every common carrier and certain specific types of agencies (such as pipe line, gas, electric, telephone, telegraph, and water corporations, wharfingers and warehousemen) without the use of 'transportation company' or similar expression. In each of those subdivisions, the definition expressly applied to the term defined 'when used in this act,' a limitation now expressed in §203 of the code.

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[5]"The defendant herein does not in this proceeding question that it is a 'transportation company' as that term is used in the Constitution and, as such, is subject to the jurisdiction which the Constitution directly confers upon the Commission over such companies."

"It would seem, therefore, that the absence of the term 'transportation company' from the code is no accident; that it is the result of an intentional act of exclusion. This fact, coupled with the specific enumeration of carriers in the statutory definition of 'common carrier,' suggests that the legislature, soon after the 1911 amendment of the Constitution, adopted the policy of not exercising its 'plenary' power over any new type of 'transportation company' (such as a stage line, truck line, or air line) until that type of transportation shall have been in operation long enough for the legislature to determine how much, if any, regulation and control over it should be given the commission in addition to that directly conferred by the Constitution.

"Not inconsistent with this view was the construction placed upon the statute by the commission and approved by the court in Western Ass'n of Short Line R. R. v. Railroad Comm., 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455, decided in December, 1916. The question at issue was whether or not common carriers by truck or stage upon the highways, operating between cities in this state, were subject to the jurisdiction of the commission. The court held that jurisdiction over such carriers, as 'transportation companies,' was conferred by section 22 of Article XII of the Constitution.

"Concerning the lack of statutory regulation of carriers by stage or truck (methods of transportation that were relatively new in 1916), the court said: 'We agree with the construction placed by the commission upon the legislative enactments and with its conclusion that the Legislature inadvertently failed or deliberately declined to make a specific grant of power to the railroad commission to

regulate the affairs of these classes of transportation companies. We need not here repeat the convincing reasoning of the commission in this behalf, since doubtless its views will find expression in its own official reports, and it is sufficient for the purposes of this determination to express our concurrence in and with them.' 173 Cal. at page 804, 162 P. at page 391.

"The history of statutory changes on this subject since 1911 indicates adherence to a policy of the legislature not to exercise its 'plenary' power over new types of transportation until experience might demonstrate a need therefor.

"An act adopted in 1917 imposed certain requirements upon the owners and operators of stages and trucks when functioning as common carriers. It placed them under the regulation and control of the commission. Stats. 1917, c. 213, p. 330.

"The definition of 'common carrier' in the Public Utilities Act was enlarged in 1927 to include passenger stage corporations, Stats. 1927, c. 42, p. 72 at 73, adding § 2¼ to the Act of 1915; in 1933, to add freight forwarders, Stats. 1933, c. 784, p. 2083 at 2085, amending § 2 of the Act; in 1935, to include highway common carries, Stats. 1935, c. 664, p. 1830 at 1831, adding § 2¾ to the Act; and in 1949, to add petroleum irregular route carriers, Stats. 1949, c. 1399, p. 2440 at 2441, amending § 2¾ of the Act.

"Note should be made of a Supreme Court decision rendered in 1943 which held constitutional a certain city ordinance concerning taxicab service. We refer to In re Martinez, 22 Cal. 2d 259, 138 P. 2d 10. The court found that the legislature had not yet put taxicabs under the

jurisdiction of the commission. After quoting the pertinent features of the statuory definitions of 'common carrier' and 'public utility,' the Court said: 'Nowhere on the quoted provisions of the Public Utilities Act, nor in its other provisions, do we find any reference to taxicabs or taxicab companies. Each of the many agencies designated in subdivisions (dd) and (1) is specifically mentioned and described in detail or is included in groups carefully described in the act. If the Legislature had intended to include taxicabs it would not have omitted reference to them while included detailed descriptions of all other agencies covered by the act, some of which perform similar services. Moreover, references in other parts of the act to common carriers "subject to the provisions of this act" indicate a legislative intention not to include all common carriers.' 22 Cal. 2d at page 262, 138 P. 2d at page 11.

"The court did not mention section 22 of Article XII of the Constitution, which by its own terms puts 'railroad and other transportation companies' under the jurisdiction of the commission to a limited extent. Section 22, perhaps, was deemed inapplicable because it refers to compensation for transportation of passengers or freight 'between the points named in any tariff of rates' established by the commission, and the city ordinance in question was 'confined in its effect to service performed within the city'. 22 Cal. 2d at page 262, 138 P. 2d at page 12.

"We note in passing that section 2113 of the code, relating to contempt of the commission and its power to punish such contempt, is broader in its application than section 2107. Section 2113 applies to every 'public utility, *corporation, or person*'. That may well include a common carrier by air to the extent that such a carrier, viewed

as a 'transportation company,' may be subject to the jurisdiction which section 22 of Article XII of the Constitution confers upon the commission. Our attention has been called to no other provision of the Public Utilities Act portion of the code which directly or indirectly mentions common carriers by air."

The foregoing quotation from the opinion of Justice Wood satisfies me that the judgment of the trial court should be affirmed, but, in view of the fact that the majority of this court have concluded that the judgment should be reversed, I deem it proper to add these observations:

The majority (if they must reach the decision they do reach) properly point out that the commission by its decision of April 24, 1951 (which by its own terms was not to become effective until May 9, 1951), "expressly advised the companies that they would *thereafter* be deemed to be transportation companies, common carriers and public utilities within the meaning of the state constitution and be subject to its prohibition and requirements." (Italics added.) The majority opinion further states "It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in matters coming before it" and "Confusion is asserted to have resulted from divergent holdings of this court on the question whether a carrier which is in fact a common carrier transportation company should be subject to rate regulation by the commission although not specifically mentioned in the constitution or the statute."

The majority opinion continues: "In further support of its demurrer the defendant argues that the provisions of section 2107 as applied to it are unreasonable and op-

pressive and therefore in violation of the due process and the equal protection clauses of the Federal constitution, . . . There is no merit in this contention. The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties. It could have obtained a determination of its rights and obligations under California law without exposing itself to the risk of penalties.

"No showing is made that the penalties prescribed by section 2107, $500 to $2000 a day, are oppressive."

I strongly disagree with the last quoted statement. In my estimation the majority opinion on its face, by virtue of the very facts which I have quoted from it above, leads to the conclusion that to apply the penalties under the circumstances shown would be unjust and oppressive. To state, as do the majority, that "The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties" seems to me to at least border on the edge of unreality or inaccuracy.

It must be remembered that the only misconduct of the defendant upon which the commission and this court rely for invoking, for the first time in the history of this state as against an air carrier, the penal provisions of section 2107 of the Public Utilities Code, is that it put in effect a fare increase which, as appears on the face of the majority opinion, not only in the case of this defendant but also in the cases of its fellow defendants, was "made in response to a request by the chairman of the federal Civil Aeronautics Board, which they [the air carrier defendants] believed to be compulsory upon them."

As to the element of compulsion in this respect, it is to be remembered that this defendant must use exclusively —whether in interstate or intrastate commerce—airplanes which are subject to federal regulation in respect to certification, maintenance, and operation; the airways over which they fly are federally equipped and operated; the number of passengers which any given plane may carry under varying conditions, its gross load, and the rates the defendant will receive for mail (if it has a mail contract) are all subject to exclusive federal control; likewise the defendant's crewmen must be federally certified; regulations covering the hours they may work, their qualifications and the minimums of procedures for maintenance of proficiency, are all to be found in the federal Civil Air Regulations.

That the defendants in this and the companion cases (and their able counsel) had reasonable grounds for their course of conduct seems to me to be further indicated by the fact that until this day every judge who had passed upon the matter agreed with them; that includes two judges of the superior court and six justices of the District Court of Appeal. In the face of the fact that so many distinguished legal minds have concluded that on the facts pleaded the defendants cannot be held to be subject to the penal provisions of the statute relied on, it seems to me to be inescapable that at the very least such statute, insofar as concerns its applicability to defendants on the facts, must admit of differing conclusions by reasonable minds. In such circumstance I think that we should follow the usual rule and accord the benefit of any reasonable doubt to the defendant. "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which

is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation . . . [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute'." (People v. Ralph (1944), 24 Cal. 2d 575, 581; People v. Valentine (1946), 28 Cal. 2d 121, 143; see also In re McVickers (1946), 29 Cal. 2d 264, 278; In re Bramble (1947), 31 Cal. 2d 43, 51; People v. Chessman (1951), 38 Cal. 2d 166, 182; Ex parte Rosenheim (1890), 83 Cal. 388, 391; People v. Sayre (1937), 26 Cal. App. 2d Supp. 757, 761.)

For all of the reasons above stated, I would affirm the judgment.

SCHAUER, *J.*

I concur:

EDMONDS, *J.*

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IN THE

Supreme Court of the United States

October Term, 1954.
No. 316.

WESTERN AIR LINES INC.,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Under authority of Rule 16, paragraph 3, of the Revised Rules of the Supreme Court of the United States appellant, Western Air Lines, Inc., respectfully presents this brief in opposition to the motion to dismiss or affirm.

Applicant opposes the motion on these grounds:

1. The questions presented are substantial and require plenary consideration, with briefs on the merits and oral argument, for their resolution.

2. This Court may consider the case on its merits, notwithstanding dismissal of the appeal of Western Air Lines in *Western Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U. S. 908 (1952).

ARGUMENT.

I.

The Questions Presented Are so Substantial and so Vital to the Air Transportation Industry as to Require Full Consideration by This Court.

Appellee's motion attempts to pass off as trifling the serious questions raised by appellant. The questions presented are not trivial. They strike at the heart of the national air transportations system established and developed by the Federal Government at great expense, for if economic control of Federally certificated air carriers be arrogated by the States, as it will if the decision below be allowed to stand, Federal control over the purse-strings of commercial aviation—compensation for carrying the United States mail—will be usurped.

To support the charge that the questions presented are so unsubstantial and devoid of merit as not to warrant full consideration by this Court, appellee must indulge and has indulged in an assumed analogy between air transportation and surface-bound transportation. Thus, on page 8 of the motion, appellee declares the law to be that interstate air carriers are subject to local regulation until the Congress preempts the field and that Congress has not so acted. On the contrary,

1. There is no decision of this Court establishing that air carrier operations are subject to State regulation;

2. There is no decision of this Court defining the extent to which the Congress has preempted the field of economic regulation of air carriers; and

3. There is no decision of this Court holding that the Congress did not intend, or that the Congress failed, to clothe the Civil Aeronautics Board with complete and exclusive regulatory power over all operations of *interstate* air carriers.

The proposed legislation referred to by appellee was designed to clarify the power of the Civil Aeronautics Board to regulate air lines operating wholly within the borders of a single State. The rejection of such legislation is not material to the issues of this case.

This case questions the extent to which, if at all, States may regulate the economic affairs of interstate air carriers. Until the decision of the Supreme Court of the State of California in this case, no written opinion has been handed down by any court stating the limits or dual capacity of Federal and State control over air line operations by interstate air carriers.

The requirement that the domestic air transportation industry of the United States know to what extent it must yield to State economic control and to what extent it may ignore attempted control by the Civil Aeronautics Board is of transcendant importance.

The numerous decisions of this Court touching on State functions in regulating surface-bound carriers are not controlling here. Other than the fact that air carriers and surface carriers transport persons and property from one point to another for pay, there is no historic or real relationship or resemblance between air carriers and surface-bound carriers.

A. The Questions Presented Are Not Frivolous.

This appeal is not frivolous, as charged by appellee. It is an earnest and sincere effort to get this Court for the first time to construe the Commerce Clause and the Civil Aeronautics Act in relation to State power to regulate interstate air carriers.

In *Louisville & Nashville R. R. Co. v. Melton,* 218 U. S. 36, 30 S. Ct. 676, 54 L. Ed. 921 (1910), Mr. Justice White made these statements:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issues here presented; . . ." (p. 49).

Likewise, in *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194 (1923), Mr. Justice Sanford declared:

> "The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous . . ." (pp. 716-717).

B. The Questions Presented Are Not Wanting in Substance and Need Further Argument.

The question on which a decision is sought, is by no means free from debate.

On the question of to what extent the Congress has occupied the field of regulation, the dissenting Justices below made these observations:

> ". . . this defendant must use exclusively—whether in interstate or intrastate commerce—airplanes which are subject to federal regulation in respect to certification, maintenance, and operation; the airways over which they fly are federally equipped and operated; the number of passengers which any given plane may carry under varying conditions, its gross load, and the rates the defendant will receive for mail (if it has a mail contract) are all subject to exclusive federal control; likewise the defendant's crewmen must be federally certified; regulations covering the hours they may work, their qualifications and the minimums of procedures for maintenance of proficiency, are all to be found in the federal Civil Air Regulations." (Appendix A to Statement as to Jurisdiction, p. 44.)

As pointed out at page 13 of appellant's Statement as to Jurisdiction, Federal control over the practices and operations of air carriers coming within the Civil Aeronautics Act is extensive and all embracing. The Congress left nothing unregulated.

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Mr. Justice Jackson, has summed up the difference between surface-bound and air transport under the Commerce Clause in this fashion:

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." (Concurring opinion in *Northwest Air Lines, Inc. v. State of Minnesota*, 322 U. S. 292, at 303 (1944).)

The persuasive effect of the decision of the California Supreme Court on the courts of sister States makes it imperative that this Court now resolve the questions presented. The national air line industry is entitled to an affirmative decision, by the highest Court in the land, whether its economic affairs are subject to regulation only by the Civil Aeronautics Board or whether it must yield to local as well as Federal control.

II.

This Court's Dismissal of an Appeal in a Prior Case Does Not Bar a Decision on the Merits in This Case.

It is urged by appellee that this Court's dismissal of an appeal by Western Air Lines in a related but different case (*Western Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U. S. 908), without opinion and on a divided vote, bars consideration of this appeal.

Res judicata and estoppel by judgment, when applicable, rest on policy reasons dictated by a desire to have a well regulated system of jurisprudence and to provide an end to litigation. Where application of the barrier would be

inequitable, there is no rule of law requiring that the Court refrain from considering the matter on its merits.

The dismissal without opinion by this Court of the other case was at the threshold of the appeal without the opportunity of fully presenting the case on brief and through oral argument. The appeal was from a decision of the Supreme Court of the State of California made in the form of an order also without opinion.

In this case the California Supreme Court, not deterred by the pleas of *res judicata* and estoppel, publicly voiced its opinion and resolved the Federal questions presented. It would be a harsh rule indeed if appellant were not now permitted to challenge that opinion, reduced as it has been from conjecture to material form.

The questions raised on the former appeal and the questions presented on this appeal are not identical. The questions presented here are directed solely at the validity of State regulation of the intrastate operations of *interstate* air carriers.

Conclusion.

The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Los Angeles, California, October 8, 1954.

Respectfully submitted,

HUGH W. DARLING,
DONALD K. HALL,
Counsel for Appellant.

D. P. RENDA, and
GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

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HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 316

WESTERN AIR LINES, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

EVERETT C. McKEAGE,
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In the Supreme Court
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OCTOBER TERM, 1954

No. 316

WESTERN AIR LINES, INC.,	*Appellant,*
vs.	
PEOPLE OF THE STATE OF CALIFORNIA,	*Appellee.*

Appeal from the Supreme Court of the State of California.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

Appellee in the above-entitled case moves to dismiss or affirm on the ground that the appeal does not present a substantial federal question for the reasons that:

1. Both of the precise questions presented by this appeal have been previously decided by this Court in an appeal involving the same cause of action and substantially the same parties, and said questions are therefore *res judicata.*

2. Said questions are intrinsically so unsubstantial and devoid of merit as not to warrant this Court in hearing argument upon them.

ARGUMENT.

I.

THE QUESTIONS PRESENTED ARE RES JUDICATA.

On page 8 of its Jurisdictional Statement appellant refers briefly to its prior appeal to this Court which was dismissed for want of a substantial federal question. (*Western Air Lines, Inc., v. Public Utilities Commission of the State of California*, 342 U.S. 908; October Term 1951, No. 465.)

It appears on pages 7 and 8 of said Jurisdictional Statement, in appellant's "Statement of the Case", that both the former and the present appeal arose out of the same cause of action, namely, appellant's increasing its intrastate air coach fares between Los Angeles and San Francisco, California, without having previously obtained authority therefor from the Public Utilities Commission of the State of California, contrary to California law.

In the former case, the appeal to this Court was from the denial by the California Supreme Court of a petition for a writ of review of a decision of said Commission which authorized and established said increased fares but ordered appellant to make reparation to passengers who had paid such increased fares prior to the time they were authorized.

In the present case, the appeal is from the reversal by the California Supreme Court of a judgment for the

defendant entered by the trial court after sustaining a demurrer to a complaint brought against the appellant in the name of the People of the State of California by the attorney of said Commission pursuant to law, seeking penalties which were alleged to have been incurred by the appellant under California law as a result of its having thus increased said fares without authority.

In these two proceedings the cause of action is the same, that is, the raising of certain fares without authority. The difference between them is in the remedy pursued for that cause of action.

In the former appeal the questions presented were described by the appellant on page 12 of its "Statement As To Jurisdiction" in that appeal (judicial notice of which may be taken [*United States v. Pink*, 315 U.S. 203, 216, 86 L. ed. 796, 810]) in the following language:

"*Basic Questions Presented*

"The basic questions which will be presented by the appeal, to one or the other of which each of the assignments of error listed in the Assignment of Errors compiled under Rule 9 of the Rules of the Supreme Court of the United States is related, are:

"1. Has the Civil Aeronautics Act of 1938, as amended, (52 Stat. 977, 49 USC 401 et seq.) preempted the entire field of civil aviation to the exclusion of the right or power of any state or of any state agency to exercise jurisdiction or authority over commercial air transportation?

"2. Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an interstate segment of a

federally certificated interstate air route, a burden on interstate commerce and thus in violation of Subsection 3 of Section 8, Article I of the Constitution of the United States?"

A comparison of these questions with those set out on page 6 of the Jurisdictional Statement in the present appeal will show that the two groups of questions are in substance identical with each other, the only differences being in the order in which the two questions are set out, and certain immaterial differences in phraseology. In both appeals one of the questions is whether the Congress of the United States has fully occupied the field of regulation of commercial air transportation. The other question in both appeals is whether state regulation of air carriers is a burden on interstate commerce in violation of Article I, Section 8, subsection 3 of the Constitution of the United States.*

It will thus be seen that the underlying issue in each of these two proceedings is the same, namely, the lawfulness of the exercise of state power in regulating air carrier intrastate fares between Los Angeles and San Francisco, California. In the former appeal such regulation took the form of establishing fares and ordering reparations; in

*In the "Questions Presented" in the present appeal it appears somewhat more clearly than in the former appeal that the appellant is raising the question of the validity of state regulation of *intrastate* operations of air carriers. However, reference to other portions of the former "Statement As To Jurisdiction", viz., pp. 2, 3, 9, 10, 11, shows that regulation of *intrastate* commerce, specifically air coach transportation between Los Angeles and San Francisco, was there in issue.

the present a complaint for penalties. As already indicated, these are merely two different procedures for implementing the same state power, that is, the power to regulate common carrier rates.

Sunshine Anthracite Coal Co. v. Adkins (1939), 310 U.S. 381, 401, 84 L. ed. 1263, 1275.

Moreover, the parties in the two appeals are substantially the same.

Sunshine Anthracite Coal Co. v. Adkins, supra.

In the former appeal the Public Utilities Commission of the State of California became the appellee after a proceeding in which said Commission, exercising the state's delegated power over the rates of common carriers, issued a decision establishing certain fares and ordering appellant to make reparation of fares unlawfully collected, the Commission becoming a nominal party in this Court.

In the present appeal the state is itself a party after bringing an action for penalties (the attorney of said Commission acting for it pursuant to law [California Public Utilities Code, Section 2104]), as an alternative and cumulative sanction for its power over the rates of common carriers.

In *Sunshine Anthracite Coal Co. v. Adkins,* supra, this Court on page 402 (L. ed. p. 1276) quoted from its decision in the case of *Chicago R.I. and P.R. Co. v. Schendel,* 270 U.S. 611, 620, 70 L. ed. 757, 764, as follows:

> "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same."

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This Court then added:

> "A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. [Citing *Cromwell v. Sac. County*, 94 U.S. 351, 24 L. ed 195.] There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."

In the case cited, i.e., *Sunshine Anthracite Coal Co. v. Adkins,* this Court held that a certain commission created by Congress "represented the United States" in a prior proceeding and that the United States as well as the appellant in that proceeding was bound thereby.

Likewise in the prior appeal brought by Western Air Lines, Inc., the Public Utilities Commission represented the State of California, and the state as well as the appellant was bound by the decision therein.

Since the cause of action, the parties and the issues are the same in this as in the former appeal, the questions presented herein are *res judicata.*

Sunshine Anthracite Coal Co. v. Adkins, supra.

In the case just cited, this Court also said at page 403 (L. ed. p. 1276): ". . . In general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."

It does not matter whether the questions presented in the present appeal are considered as *res judicata* by virtue

of the decision itself of the Public Utilities Commission of the State of California, or by virtue of the decision of the California Supreme Court denying review without opinion, or by virtue of this Court's dismissing the appeal from such denial. (See discussion and cases cited on pp. 5-10 of Appendix A of Jurisdictional Statement in present appeal; also *Angel v. Bullington,* [1946] 330 U.S. 183, 190, 91 L. ed. 832, 837, where this Court held that the doctrine of *res judicata* may arise as a result of an adjudication declining to reach the merits of the issues presented.)

In any event, the questions presented by the present appeal have been finally adjudicated. The appellant has already exhausted its rights with respect to those questions and is not entitled to relitigate them.

Angel v. Bullington, (1946) 330 U.S. 183, 190-192, 91 L. ed. 832, 837, 838.

As already indicated, appellee urges that as between the present and former appeals, there is identity of cause of action as well as parties and issues, and therefore that the issues presented in the present appeal are *res judicata* in the strictest sense of that doctrine.

However, even if it could be properly said that the cause of action is different in the two appeals, nonetheless the issues presented in the prior proceeding are identical with those presented here. The parties being substantially identical, the doctrine of collateral estoppel would therefore be effective as a bar to any further consideration of those issues.

Commissioner v. Sunnen (1947), 333 U.S. 591, 92 L. ed. 898.

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II.

THE QUESTIONS PRESENTED ARE INTRINSICALLY SO UNSUBSTANTIAL AND DEVOID OF MERIT AS NOT TO WARRANT THIS COURT IN HEARING ARGUMENT UPON THEM.

Appellee's argument upon the merits of the questions presented in this appeal have been set out in its "Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm" filed in the former appeal, viz., *Western Air Lines, Inc. v. Public Utilities Commission of the State of California,* October Term 1951, No. 465.

Appellee here refers the Court to that argument if it desires to re-examine the merits of those questions. Appellee does not deem it necessary or desirable to repeat the argument at length here.

Briefly, Appellee's argument was (and is) as follows:

1. Numerous decisions of this Court establish the principle that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation insofar as intrastate operations are concerned, even though their interstate operations are regulated by federal authority; and such state regulation is not a burden on interstate commerce.

2. The absence of any intention of Congress to pre-empt the entire field of economic regulation of air transportation is manifest from the language of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U.S.C. 401, et seq.), as well as from the repeated refusal of Congress to enact proposed legislation designed to extend federal regulation to intrastate air transportation.

On pages 14 and 15 of said "Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm", reference was made to certain bills introduced in Congress and to certain reports of the proceedings of the National Association of Railroad and Utilities Commissioners containing discussions of those bills and the opposition they met in Congressional committees. Reference was also made thereto by the California Supreme Court in its decision in the present case (See pp. 27, 28 of Appendix "A" to present "Statement as to Jurisdiction").

From this legislative history, as well as from the language of the Civil Aeronautics Act itself, it is abundantly clear that Congress had no intention of precluding state economic regulation of intrastate air transportation.

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"
>
> *Arkansas Railroad Commission v. Chicago R.I. & P. Co.* (1927), 274 U.S. 597, 603, 71 L. ed. 1224, 1228.

Although the legislative history above described is not encouraging to the proponents of exclusive federal regulation of air transportation, nonetheless Congress, and not this Court, is the proper forum to which resort must be had if state regulation is to be foreclosed.

Appellee submits that this appeal is so utterly lacking in merit as to risk being labelled frivolous. Whether it

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deserves that characterization, appellee leaves to this Court to decide.

Dated: San Francisco, California,
September 20, 1954.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel, Public Utilities Commission of the State of California,
J. THOMASON PHELPS,
Senior Counsel, Public Utilities Commission of the State of California,
Attorneys for Appellee.

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No. 316. WESTERN AIR LINES, INC. *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Hugh W. Darling* and *D. P. Renda*

for appellant. *Everett C. McKeage* for appellee. Reported below: 42 Cal. 2d 621, 268 P. 2d 723.

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